

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN A. COMPTON,

Defendant-Appellant.

UNPUBLISHED

May 19, 2005

No. 246333

Wayne Circuit Court

LC No. 01-007500-01

Before: Gage, P.J., and Cavanagh and Griffin, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of felony murder, MCL 750.316(1)(b). Defendant was sentenced to life in prison without parole. We affirm.

Defendant cleaned the victim's gutters on June 4, 2001, and the victim paid him with a check. The victim, an eighty-two-year-old woman, was found in her home in Redford Township on June 5, 2001. She died as a result of blunt force trauma to her head and a wound to her neck, and there was evidence of an attempt to suffocate her. On June 5, 2001, defendant cashed the victim's check at one bank location and cashed a second check from the victim at another location. The second check was not recorded in the victim's check register.

Defendant was arrested and questioned by the police. The questioning ceased when defendant became ill and vomited. Defendant slept that evening, and the police later questioned him again. The questioning ceased when defendant requested an attorney. Later that day, Sergeant Adam Pasciak and Sergeant Peter Lusi approached defendant in his cell. Sergeant Pasciak wanted to ask defendant about his welfare or whether he had obtained an attorney. Defendant indicated that he wanted to talk privately with Sergeant Pasciak and another officer, presumably Inspector James Wandyg, instead of an attorney. Defendant made verbal and written statements, confessing to the murder. Shortly after defendant made his statements, court-appointed counsel for defendant arrived at the police station.

Defendant claims that the trial court erred in ruling that his confession was voluntary and admissible at trial. We review de novo a trial court's ultimate determination on a motion to suppress evidence. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000); *People v Akins*,

259 Mich App 545, 563; 675 NW2d 863 (2003). Reversal is warranted where the trial court's findings of fact regarding the *Walker*¹ hearing were clearly erroneous. *Daoud, supra* at 629; *Akins, supra* at 563. A finding is clearly erroneous if it leaves us with a definite and firm conviction that the trial court has made a mistake. *Daoud, supra* at 629; *Akins, supra* at 564.

Once an accused has requested counsel, the police may not further interrogate him until counsel has been made available, "unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981); *People v McRae*, 469 Mich 704, 715; 678 NW2d 425 (2004). "A statement obtained from a defendant during a custodial interrogation is admissible only if the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights." *Akins, supra* at 564, citing *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). A confession or waiver of constitutional rights requires that the statement be made without "intimidation, coercion, or deception." *Akins, supra* at 564. The prosecution must prove by a preponderance of the evidence that a defendant's statement was made voluntarily. *Id.* To determine the voluntariness of a statement, a court must consider the non-exclusive factors as identified in *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988):

In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.

Moreover, "[t]he ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made." *Id.*

At the conclusion of the *Walker* hearing, the trial court ruled that defendant's statement to the police was voluntary and denied defendant's motion to suppress. The trial court found that defendant clearly understood his constitutional rights, particularly his right to an attorney. The trial court also found that the testimony and the videotaped recordings of the interviews clearly indicated that defendant reinitiated contact with the police after having requested an attorney. The trial court noted that defendant's testimony was inconsistent and lacked credibility. The trial court found that defendant did not take certain remarks by officers as threats or as the basis for his confession. The trial court further found that court-appointed counsel was not present at the police station at the time the final interview began.

¹ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

The trial court is in “the best position to assess the crucial issue of credibility.” *Daoud, supra* at 629; *Akins, supra* at 566. In the instant case, there was evidence that defendant initiated contact with the police, as both Inspector Wandyg and Sergeant Lusi testified that defendant requested to speak to the police after having previously requested an attorney. Considering the *Cipriano* factors, there was evidence of the following: (1) defendant was thirty-four years old; (2) defendant had completed the eleventh grade and earned a GED; (3) defendant had experience with the criminal justice system, as he had two prior felonies and several other misdemeanors on his record; (4) defendant was questioned at various times during a three-day period and gave verbal and written statements within a forty-five minute period on the third day; (5) defendant was advised of his constitutional rights during each interview, and he understood these rights; (6) defendant was returned to his cell after he vomited during the initial interview; (7) defendant never requested a doctor or sought medical attention regarding his illness; (8) defendant was provided with a blanket and slippers when he indicated that he was cold, and he was later allowed to have some of his own clothes after the police determined that the clothes were not evidence; (9) all those in custody regularly received food and water; and (10) defendant received water when he returned to his cell and had been able to sleep in his cell.

Moreover, there was no evidence of coercion. Defendant denied that he gave the statement to police because of promises or threats of additional time in prison. Defendant initially believed that Sergeant Lusi was his attorney and had talked with him before giving his statement. However, defendant admitted that Sergeant Lusi never told defendant that he was an attorney and that he never asked Sergeant Lusi if he was an attorney. Inspector Wandyg testified that he told defendant Sergeant Lusi was not an attorney before defendant gave his statement. There was also evidence that the police had begun the final interview at defendant’s request before the arrival of court-appointed counsel. Defendant signed the advice of rights form at 3:40 p.m., and court-appointed counsel did not arrive at the police station until approximately 4:20 p.m. Given the totality of the circumstances, we conclude that no clear error existed in the trial court’s ruling that defendant’s statement was voluntary and admissible.

Defendant next argues that the trial court erred in providing the jury with the deadlocked jury instruction instead of sua sponte declaring a mistrial. When a party “specifically approves” a jury instruction, the party waives its right to appeal the issue, thereby extinguishing any error. *People v Carter*, 462 Mich 206, 220; 612 NW2d 144 (2000); *People v Lowery*, 258 Mich App 167, 173; 673 NW2d 107 (2003) (finding waiver when defendant informed the trial court that he had “no additional objections”). After approximately 1-1/2 days of deliberations, the jury sent the trial court a note stating, “We are presently deadlocked. We have looked at this case from multiple angles, and no clear decision can be made on this case. We have made no clear decision in the past two days.” The trial court read this note to the prosecutor and defense counsel and stated its intention to read CJI2d 3.12, the “deadlocked jury” instruction. Defense counsel stated that he had “[n]o objection” to the trial court giving the deadlocked jury instruction. Accordingly, the trial court read the deadlocked jury instruction, and the jury returned a verdict the following day.

Lastly, defendant claims that he was denied effective assistance of counsel because defense counsel failed to move for a mistrial based on the deadlocked jury. Because defendant failed to file a motion for a new trial on these grounds or request a *Ginther*² hearing, our review is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003). Whether a defendant has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* We review a trial court's findings of fact for clear error and questions of constitutional law de novo. *Id.*

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Under this standard, defendant must show that the trial court would have granted a mistrial if defense counsel had requested it. Defendant bears the heavy burden of overcoming the presumption that counsel's representation was effective. *LeBlanc, supra* at 578. He must also overcome the presumption that counsel's performance constituted sound trial strategy. *Riley, supra* at 140.

The classic basis for a proper mistrial is when a trial court believes that a jury is unable to reach a verdict. *Arizona v Washington*, 434 US 497, 509-510; 98 S Ct 824; 54 L Ed 2d 717 (1978). We afford "great deference" to a trial court's decision whether to declare a mistrial when a jury is deadlocked. *People v Lett*, 466 Mich 206, 213; 644 NW2d 743 (2002). While a trial court cannot be compelled to give the deadlocked jury instruction, such an instruction is generally an appropriate step before declaring a mistrial. See *Id.* at 222-223. Defendant fails to offer any evidence from the record to overcome the presumption that defense counsel's failure to move for a mistrial when the trial court decided to give the deadlocked jury instruction was merely trial strategy. Therefore, we hold that defendant failed to overcome the presumption that he received the effective assistance of counsel.

Affirmed.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Richard Allen Griffin

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).